

STATE OF MICHIGAN
COURT OF APPEALS

ERB LUMBER, an assumed name of CAROLINA
HOLDINGS MIDWEST, LLC,

UNPUBLISHED
November 25, 2003

Plaintiff/Counterdefendant-
Appellant,

v

CURRIER LAND DEVELOPMENT, INC.,
and KEVIN CURRIER,

No. 241249
Macomb Circuit Court
LC No. 00-002447-CH

Defendant/Counterplaintiff/Cross-
defendant-Appellees,

MICHAEL T. KONCZALSKI and BANK
UNITED,

Defendants,

and

STATE OF MICHIGAN DEPARTMENT OF
CONSUMER AND INDUSTRY SERVICES,
HOMEOWNER CONSTRUCTION LIEN
RECOVERY FUND,

Defendant/Crossplaintiff.

Before: Schuette, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order setting aside judgment in favor of defendants, Currier Land Development, Inc., and Kevin Currier (“Currier”), pursuant to MCR 2.612(C). We affirm.

I. FACTS

On June 13, 2000, plaintiff filed a complaint to collect amounts due for materials supplied by plaintiff to defendant, Currier Land Development, Inc. Kevin A. Currier was later added as a defendant. Michael T. Konczalski, the home owner, Bank United, the mortgagee, and the State of Michigan Department of Consumer and Industry Services, Homeowner Construction Lien Recovery Fund (the "Fund"), were also added as defendants because this action involved a construction lien against residential property.

On July 18, 2000, the Fund filed a cross-claim against Currier seeking subrogation, contribution and/or indemnification for any amounts that may be paid by the Fund on Currier's behalf. Currier filed a counter-claim against plaintiff alleging misappropriation of funds, unauthorized charges, slander/liable, negligence, breach of promise and breach of contract on August 9, 2000.

On January 30, 2001, a default judgment was entered against Currier for failure to appear. The counter-claim against plaintiff was also dismissed. The court stated that upon payment of \$350 plus costs to plaintiff by February 13, 2001, the default and dismissal would be set aside.

On September 13, 2001, a settlement agreement was placed on the record. The agreement was documented by a signed settlement agreement and filed with the court on September 25, 2001, settling Macomb Civil Action No. 00-002447-CH. Under the terms of the agreement, Currier was to pay a sum total of \$60,000 to settle both matters referred to in the settlement agreement. Payments were to be made in three installments of \$20,000 each on or before the close of business on the dates of October 12, 2001, November 12, 2001, and December 12, 2001. A provision in the settlement agreement stated:

In the event of default in the payments as agreed, upon the filing of an affidavit by Erb that the payments have not been received, Judgment in favor of Erb and against defendants Currier, jointly and severally, shall enter as follows: in Macomb Civil Action No. 00-2445-CH, Twenty Seven Thousand Four Hundred Twenty Six and 29/100 (\$27,426.29) Dollars and in Macomb Civil Action No. 00-2447-CH, Sixty Thousand Seventy-Two and 02/100 (\$60,072.02) Dollars. In the event of default in the payments, any Judgment entered in accordance with the parties settlement agreement shall reflect a credit for any payments received from Currier.

If, however, the settlement agreement was performed as agreed, plaintiff's complaint would be dismissed and plaintiff's construction lien would be discharged.

Currier made the first two payments, those of October 12, 2001, and November 12, 2001, as agreed. On December 12, 2001, Currier tendered a check for the final \$20,000, which was returned by the bank on December 18, 2001, for non-sufficient funds. On December 18, 2001, and December 20, 2001, counsel for plaintiff notified counsel for Currier that the check had been dishonored. Currier did not take any action to make the check good or to object to the entry of judgment.

On December 21, 2001, plaintiff submitted an affidavit and proposed judgment under MCR 2.602(B)(3), the "seven day rule," to the court and all counsel of record, in furtherance of

its remedy for default. No objection was made as of January 18, 2002, and the court entered the proposed judgment in the amount of \$47,498.31 (\$87,498.31 minus the \$40,000 previously paid).

Also on January 18, 2002, Currier tendered a check to plaintiff's counsel in the amount of \$20,000. Plaintiff immediately faxed over a copy of the check to Currier's counsel with a message stating that the check could either be applied to the total balance or it would be returned. No response to this message was received. On January 23, 2002, plaintiff advised counsel for Currier that if no response was received by January 28, 2002, the check would be deposited and applied to the balance under the January 18, 2002, judgment. On January 30, 2002, plaintiff deposited the check.

On February 26, 2002, Currier filed a motion to set aside judgment and/or for satisfaction of judgment. Plaintiff argued that Currier had failed to take any action to correct the NSF check for thirty seven days, despite six occasions between December 1, 2001, and January 23, 2002, in which plaintiff's counsel notified Currier of the situation. Due to this, and to the fact that Currier voiced no objection to the entry of judgment, plaintiff argued that there was no excusable neglect on the part of Currier.

On February 28, 2002, a hearing was held on the motion to set aside judgment. At this hearing, Currier stated that the check of December 12, 2001, was dishonored not due to insufficient funds, but rather, because the account was frozen by virtue of an execution in another matter, which was eventually set aside. Currier argued that because of the delay in payment, it may owe interest, but to allow plaintiff to collect the money owed because of default would be inequitable and unfair.

On April 18, 2002, the court issued its opinion and order, setting aside the judgment entered on January 18, 2002, granting satisfaction of the settlement agreement and dismissing plaintiff's complaint with prejudice. The order was entered pursuant to MCR 2.612(C)(1). The court found that because there was evidence that Currier did have sufficient funds to honor the check on December 12, 2001, but the account was frozen, and due to the holidays and some minor delays by Currier, it was not tendered until January 18, 2002, and that it would be a substantial injustice if the judgment of January 18, 2002 was not set aside. The opinion and order closed the last pending claim in the matter and closed the case. Plaintiff now appeals as of right.

II. SETTING ASIDE A JUDGMENT

Plaintiff contends that Currier was not entitled to relief from the January 18, 2002, judgment under MCR 2.612(C). We disagree.

A. Standard of Review

A trial court's decision to grant or deny a motion to set aside a prior judgment is reviewed for an abuse of discretion. *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999).

B. Analysis

Pursuant to MCR 2.612(C)(1), a party may be relieved from a final judgment, order, or proceeding on any of the following grounds:

- (a) Mistake, inadvertence, surprise, or excusable neglect.
- (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
- (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
- (d) The judgment is void.
- (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
- (f) Any other reason justifying relief from the operation of the judgment.

Currier argued that it was entitled to relief under MCR 2.612(C)(1)(a), (c), or (f).

Under MCR 2.612(C)(1)(a), the court must find “mistake, inadvertence, surprise, or excusable neglect” in order to set aside a judgment. In this case, Currier claimed that there was mistake, inadvertence, surprise or excusable neglect with regard to the December 12, 2001, payment. “When performance [of a contractual obligation] is due, however, anything short of full performance is a breach, even if the party who does not fully perform was not at fault and even if the defect in his performance was not substantial.” *Woody v Tanner*, 158 Mich App 764, 772; 405 NW2d 213 (1987), quoting Restatement Contracts, 2d, § 235, Comment b, p 212. Regardless if Currier was not at fault in the non-payment of the funds, there was no mistake, inadvertence, surprise or excusable neglect that would relieve it of its duties under the settlement agreement.

Under MCR 2.612(C)(1)(e), a court may relieve a party from a judgment on the ground that “the judgment has been satisfied, released, or discharged . . . or it is no longer equitable that the judgment should have prospective application.” The judgment of January 18, 2002 ordering Currier to pay \$47,498.31, has not been satisfied, making subrule (e) inapplicable.

In deciding this case, the trial court stated that, “given the cause of the dishonored check and reasons for delay, substantial injustice would result if the Judgment entered January 18, 2002 were not set aside.” From the language stated in the opinion, the only subsection that “substantial injustice” would properly fit under is subsection (f). Therefore, this Court must determine if the trial court abused its discretion in deciding that Currier was entitled to relief from the January 18, 2002 judgment under MCR 2.612(C)(1)(f).

In *Heugel, supra*, 237 Mich App 478-479, this Court noted that for relief to be granted under MCR 2.612(C)(1)(f), the following three requirements must be met: “(1) the reason for setting aside the judgment must not fall under subsections (a) through (e), (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and

(3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice.” Further, relief is usually only granted under subsection (f) if, “the judgment was obtained by the improper conduct of the party in whose favor it was rendered.” *Heugel, supra*, at 479. However, *Heugel* went on to determine that relief under subsection (f) is appropriate “even where one or more of the bases for setting aside a judgment under subsections (a) through (e) are present, when additional factors exist that persuade the court that injustice will result if the judgment is allowed to stand.” *Heugel, supra*, at 481. Relief under subrule (f) was not deliberated “to correct a failure to act or an ill-advised or careless decision by counsel.” *Mikedis v Perfection Heat Treating Co*, 180 Mich App 189, 200; 446 NW2d 648 (1989); *Lark v Detroit Edison Co*, 99 Mich App 280, 283; 297 NW2d 653 (1980). See also *Altman v Nelson*, 197 Mich App 467, 478; 495 NW2d 826 (1992).

An abuse of discretion involves exceedingly more than a difference in judicial opinion. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999), citing *Williams v Hofley Mfg Co*, 430 Mich 603, 619; 424 NW2d 278 (1988). Such abuse occurs only when the result is “so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.” *Id.*, citing *Marrs v Bd of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985), quoting *Spaulding v Spaulding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

In this case, the trial court’s decision that, under subrule (f), a substantial injustice would occur were predicated on the facts that Currier did have sufficient funds in the bank account to honor the check and there were minimal delays in the check being honored on January 18, 2002. These are reasons based on logic and reason, rather than passion or bias. *Alken-Ziegler, Inc, supra*, at 227. It is logical to find that because Currier did not knowingly violate the settlement agreement because they did have the funds in the bank and because the late payment only caused a minimal delay, it would be a substantial injustice to let stand the judgment awarding plaintiff \$27,498.31 because of the late payment. The court did not abuse its discretion by deciding through these additional facts that a substantial injustice would occur if the judgment was allowed to stand. *Heugel, supra*, at 481.

In light of our determination that the trial court did not abuse its discretion in setting aside the judgment, we decline to address the issue of whether the trial court erred when it determined that Currier satisfied its obligations under the settlement agreement.

Affirmed.

/s/ Bill Schuette
/s/ Mark J. Cavanagh
/s/ Helene N. White